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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1359

ALEX J. JUDICE and W. R. MERRITT, SR.,
Petitioners

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE

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No.

ALEX J. JUDICE and W. R. MERRITT, SR.,
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v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioners pray for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case, entered on February 16, 1972.

OPINIONS BELOW

The opinion of the Court of Appeals (App. A, pp. 1 to 7, infra), and its opinion denying the Petition for a rehearing and Petition for Rehearing En Banc (App. B, pp. 1 to 4, infra) are not yet reported.

JURISDICTION

The judgment of the panel of the court of appeals was entered on February 16, 1972. A Petition for Rehearing En Banc was filed and denied in a written opinion on March 23, 1972. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Petitioners were denied due process of law under the Fifth and Fourteenth Amendments to the Constitution by a 21-month delay between the act constituting the crime charged and the initiation of criminal actions against the Petitioners, even though the Statute of Limitations had not tolled.

2. If the due process clause of the Fifth and Fourteenth Amendments do apply to the pre-accusation delay, was the prejudice to the Petitioners sufficient to require dismissal of the indictment.

3. Whether the Petitioners were denied the right to a full hearing by the Fifth Circuit Court of Appeals rule which allowed the Court to remove Petitioners' case to the summary docket for a decision without oral argument from Petitioners.

STATEMENT

After the jury trial in the United States District Court for the Southern District of Mississippi, Petitioners were convicted in a joint trial for violations of Title 26, U.S.C., Sec. 5861, receiving or possessing a firearm (as defined in the act) not registered to him in the National Firearms Registration

Record (under Sec. 5861(d) C. I) and transferring a firearm (as defined in the act) in violation of the act without having paid a transfer tax provided for in Title 26, U.S.C., Sec. 5811 (under Sec. 5861 (e), C. II). The Petitioners were sentenced to serve two years in prison on C. I and five years probation on C. II.

The testimony at trial revealed that on April 15, 1969, an A.T.F. agent, working under cover, offered to buy fully automatic weapons from Petitioner Judice. The undercover agent admitted during the trial that he had no reason either before or after the offer made to Petitioner Judice to believe that either Petitioner had guns to sell to the agent. However, negotiations did take place and on April 18, 1969, in the early hours of the morning, the A.T.F. agent did purchase fully automatic weapons from the Petitioners. From the date of the purchase of the weapons on April 18, 1969, until an indictment was returned against the Petitioners on January 20, 1971, did the Petitioners have any reason to believe that they were to be charged with a crime. The Petitioners during the 21-month period were not arrested, no information was filed against them, no preliminary hearing was held, nor was anything otherwise done to notice them that they would be charged with committing a crime on April 18, 1969.

The Petitioners filed pre-trial motions to dismiss the indictment for the pre-accusation delay, citing several reasons, including the due process clause of the Fifth and Fourteenth Amendments raised in this Petition. Even though the Fifth Circuit Court of Appeals has never followed the ruling in *Ross v. United States*, 349 F.2d 210 (1965) it was on this leading case that the motion was based. After the cases had been briefed the Government directed the Circuit Court's attention to the decision of *United States v. Marion*, supra, by a letter. The decision in Petitioners' case sustaining the action of the District Court in denying the Motion to dismiss the indictment was grounded on *Marion*. When a Petition for a Rehearing En Banc submitted to the Court that *United States v. Marion* was based upon the Sixth Amendment and not the Fifth and Fourteenth Amendments raised by

not the Fifth and Fourteenth Amendments raised by Petitioners, the Court held that Petitioners could assert only vague generalities when claiming prejudice and no actual prejudice was shown.

ARGUMENT

1. The opinion below is in conflict with the District of Columbia Court of Appeals decision in *Ross v. United States*, supra, holding that an indictment can be dismissed for prejudice resulting from pre-accusation delay. As the Court said below, the Fifth Circuit has repeatedly rejected the *Ross* rationale in holding that delay between dates of the offense and the indictment is controlled exclusively by the applicable statute of limitations.

The case below was decided on February 16, 1972, and the decision in *United States v. Marion, et al.*, supra, was decided December 20, 1971. Prior to the decision in *United States v. Marion*, supra, this Court had not given an opinion indicating what its position might be on pre-accusation delay. However, in that decision (see App. B quoting from *Marion*) the Court noted that the statute of limitations did not fully define a Defendant's rights with respect to the events occurring prior to indictment. The Government in *Marion* conceded that the due process clause of the Fifth Amendment would require dismissal of the indictment if it were shown at trial that pre-indictment delay in the case caused substantial prejudice to a Defendant's rights to a fair trial and that that delay was a purposeful device to gain tactical advantage over the accused. The decisions then noted that the Court did not determine in that case and could not determine when and in what circumstances actual prejudice resulting from pre-accusation delay required dismissal of the prosecution. The Court also noted that prejudice to the defense of a criminal case resulted from the shortest and most necessary delays and that certainly not all delays were prejudicial to the Defendant.

The Government in conceding that a delay would require dismissal of the indictment if it were shown to prejudice the Defendant's rights to a fair trial was in error when it further conceded that the delay would require dismissal only when it was a purposeful device to gain tactical advantage over the accused. The Government cited *Brady v. Maryland*, 373 U.S. 83 (1963) and *Napue v. Illinois*, 360 U.S. 264 (1959). The cited cases have held that the good or bad faith of the prosecution is immaterial where there has been a denial of due process under the Fifth and Fourteenth Amendments. It would seem to follow that it does not matter whether or not the delay was purposeful to gain a tactical advantage, since the advantage is gained irrespective of the good or bad faith of the prosecution. It would seem that the question should be whether or not the delay has prejudiced the Defendant in his ability to defend himself. In *Marion* the Court said that the trial may demonstrate actual prejudice, but at the present time the Defendant's due process claims were speculative and premature.

The Fifth Circuit in the opinion denying the rehearing (App. B) pointed out that all practical trial lawyers are well aware that a delay is more damaging to the prosecution's case than to the defense. This is so because the prosecution has the burden of proof. However, in Petitioners' case, the trial revealed that the A.T.F. agents were conducting a five-day undercover operations. The undercover operation involved no interstate transactions, but merely transactions in one small area of the Mississippi Gulf Coast. The trial also revealed that extensive notes were made by the A.T.F. agents and it was planned that those individuals who sold guns to the A.T.F. agents would be prosecuted, subject to a final decision by the U.S. Attorney in charge of the case. In other words, the Government initiated the action which resulted in the crime being committed, and then sat back 21 months before initiating the accusation process against the Petitioners. When a case is built in such fashion for the Government, the delay normally expected to benefit the Defendant, instead benefits

the prosecution. The Defendant is in the position of not only not even knowing that he will be charged with a crime, but sits blissfully unaware while potentially valuable evidence escapes him. *United States v. Marion* pointed out that delays may result in the loss of witnesses, the destruction of material evidence, and the blurring of memories. When a person is accused of a specific crime he can devote his powers of recall to those events. However, if there is no formal accusation, the State is allowed to methodically build up its case while the prospective Defendant proceeds to lose his. Of course the *Ross* decision has already pointed out the difficulty that the Defendant has in particularizing where he has been prejudiced. "In a very real sense, the extent on which he was prejudiced by the Government's delay is evidenced by the difficulty he encountered with particularity the elements of that prejudice" *Ross v. United States*, 349 F.2d 210, at 215.

The Circuit Court in its opinion denying the Petition for the Rehearing in App. B points out the difficulty that Petitioners had in particularizing how they were prejudiced.

2. The opinion below emphasizes the inability of the Petitioners to particularize how and when they were prejudiced. (App. B, p. 3) *Ross v. United States*, 349 F.2d 210 (1965) at 215, points out the difficulty of the Defendant to show prejudice as the delay increases.

> The trial court further concluded that there was no "indication that the Defendant would have been able to present a more adequate defense if he had been arrested sooner than he was." But it was the very nature of Appellant's disability that tended to make such a showing impossible. The failure of his memory and his inability to reconstruct what he did not remember virtually precluded his showing in what respects his defense might have been more successful if the delay had been shorter. With time passed any opportunity Appellant might have had to reconstruct the events of May 10 or discover how he was disadvantaged thereby. In a very real sense, the extent

> of which he was prejudiced by the Government's delay is evidenced by the difficulty he encountered in establishing with particularity the events of that prejudice.

Petitioner pointed out below that a witness was lost and that Petitioners' witnesses had difficulty in remembering the day the crime was committed. In fact two witnesses could only say that the event took place during the spring. The Government, on the other hand, with its extensive notes, gave accurate testimony as to time, dates, amounts and other relevant matters. The trained agents were able to note information necessary to secure a conviction. The Government's testimony was sharp, crisp, and straightforward. The witnesses for the Petitioner at times appeared evasive in contrast to the Government's witnesses, but in actuality memories had been dulled. Neither can the psychological impact of such contrasting testimony be overlooked when a case is being tried before a jury. The Petitioners submit that there was sufficient evidence in this case to require dismissal of the indictment.

3. Local Rule 18 of the Fifth Circuit Court of Appeals states: "(a) Whenever the Court, sua sponte or on suggestion of a party, concludes that a case is of such character as not to justify oral argument, the case may be placed on the summary calendar. (b) A separate summary calendar will be maintained for those cases to be considered without oral argument. Cases will be placed on the summary calendar by the Clerk, pursuant to directions from the Court.(c) Notice in writing shall be given to the parties or their counsel of the transfer of the case to the summary calendar. The action of the Court below in removing Petitioners' case to the summary calendar denied the Petitioners a full hearing. Not only was the Government able to brief a case decided on December 7, 1971, which covered the issue of entrapment raised below, (Appellee's brief was filed December 29, 1971) but the case of *United States v. Marion*, supra, was brought to the Court's attention by letter on January 12, 1972, by

the Government. The Petitioners below pointed out in their brief that they would answer the first case at oral argument. Of course, the second case would also have been rebutted at oral argument. An individual Defendant simply does not have the vast machinery of the Government to gather opinions as they are released from the presses. The action of the Court below prejudiced the Petitioners in their ability to fully present their case before the Court. The importance of oral argument is pointed out by Rule 44 of the Supreme Court of the United States.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 71-2526

Summary Calendar*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

ALEX J. JUDICE and W. R. MERRITT, SR.,
Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Mississippi

(February 16, 1972)

Before GEWIN, AINSWORTH and SIMPSON, Circuit Judges.

SIMPSON, Circuit Judge: On this appeal from judgments of conviction and sentence imposed following jury verdicts of guilty returned in their joint trial for violations of Title 26, U.S.C., Section 5861, receiving or possessing a firearm (as defined in the Act) not

*Rule 18, 5 Cir.: See *Isbell Enterprises, Inc. v. Citizens Casualty Company of New York, et al.*, 5 Cir. 1970, 431 F.2d 409, Part I.

registered to him in The National Firearms Registration Record (under Sec. 5861(d), Count I) and transferring a firearm (as defined in the Act) in violation of the Act without having paid a transfer tax as provided for in Title 26, U.S.C., Section 5811 (under Sec. 5861(e), Count II), the Messrs. Judice and Merritt urge two grounds of claimed error on the part of the trial court. We conclude that error is not demonstrated in either particular and accordingly affirm.

The first contention is that their Sixth Amendment right to a speedy trial and their due process and equal protection rights under the Fifth and Fourteenth Amendment were infringed by the time lag of twenty-one months between the date of the alleged offenses and the date they were brought to trial, relying upon *Ross v. United States*, D.C. Cir. 1965, 349 F.2d 210. This contention is specious. This Circuit has repeatedly rejected the Ross rationale in holding that delay between the dates of the offense and indictment is controlled exclusively by the applicable Statute of Limitations.[1]

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[1] *Kroll v. U.S.*, 5 Cir. 1970, 433 F.2d 1282, cert. den. 402 U.S. 944, 91 S.Ct. 1618, 29 L.Ed.2d 112 (1971); *Grayson v. U.S.*, 5 Cir. 1970, 416 F.2d 1073, cert. den. 396 U.S. 1059, 90 S.Ct. 754, 24 L.Ed.2d 753, reh. den. 397 U.S. 1003, 90 S.Ct. 1114, 25 L.Ed.2d 415; lv. to file 2nd pet. for reh. den. 399 U.S. 917, 90 S.Ct. 2191, 26 L.Ed.2d 576 (1970); *McConnell v. U.S.*, 5 Cir. 1968, 402 F.2d 852, cert. den. 1969, 394 U.S. 933, 89 S.Ct. 1208, 22 L.Ed.2d 464; cert. den. 1969, 394 U.S. 933, 89 S.Ct. 1208, 22 L.Ed.2d 464; *Bruce v. U. S.*, 5 Cir. 1965, 351 F.2d 318, cert. den. 1966, 384 U.S. 921, 86 S.Ct. 1370, 16 L.Ed.2d 441; *Harlow v. U. S.*, 5 Cir. 1962, 301 F.2d 361.

Not raised here, but also dealt with in *Bruce*, *Kroll* and *Grayson*, in addition to the constitutional argument under the Fifth and Sixth Amendments, were claims that delay between date of offense and date of indictment is interdicted by Rule 48(b)'s, (F.R.Crim.P.), provision as to unnecessary delay in

The correctness of our view has recently been vindicated by the December 20, 1971 decision of the Supreme Court in *United States v. Marion*, et al., ____ U. S. ____, ____ S.Ct. ____, ____ L.Ed.2d ____ (No. 70-19, decided December 20, 1971, 40 L.W. 4092). *Kroll, Grayson, Harlow* and *Bruce*, with several other Fifth Circuit cases, and numerous cases from other Circuits, are cited by the Supreme Court in its Footnote 8 to its statement in *Marion*[2] that "the Courts of Appeal that have considered the question in constitutional terms have never reversed a conviction or dismissed an indictment solely on the basis of the Sixth Amendment's speedy trial provision where only pre-indictment delay was involved."

The remaining contention advanced by Judice and Merritt is that they were entrapped, as a matter of law, by agents of the Internal Revenue Service into commission of the offenses charged, and were hence entitled to direction of a judgment of acquittal, for which they timely moved. We find this point equally without substance, for reasons we now briefly set forth.

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presenting the charge to a grand jury. We held in both *Kroll* and *Grayson*, citing *Bruce*, that the Rule 48(b) provision is likewise governed by the applicable Statute of Limitations, that is that timely indictment under the limitation statute is not "unnecessary delay" under Rule 48(b). The Supreme Court in *Marion*, text, infra, did not decide Criminal Rule 48(b)'s applicability, but noted in its Footnote 4, (40 L.W. page 4093) that "In any event, it is doubtful that Rule 48(b) applies in the circumstances of this case, where the indictment was the first formal act in the criminal prosecution of these appellees."

[2] 60 L.E., page 4094.

The government's evidence was that after being furnished information as to automatic weapons at Paps Furniture, Reloading and Supply Store at Biloxi, Mississippi, operated by Arthur Parker, Revenue Agent Owens went to that establishment in an undercover capacity and was successful without any inducements to Parker in purchasing an automatic carbine from Parker.[3] This sale took place April 15, 1969. Agent Holt who was stationed at Meridian, Mississippi, was called down to Biloxi to work undercover with Owens and they discussed the case on the night of April 15. On the following day, April 16, the two agents went to Parker's store where Agent Holt met Parker. After a discussion of automatic guns Holt gave Parker a list of the type guns he was interested in purchasing. The appellant Judice was present in the store and was introduced to Holt. In an ensuing conversation about automatic weapons Judice asked "whether he would be interested in a 9-mm. German Schmeisser."[4] Judice told Holt that he could procure the type weapons Holt had listed and an appointment was made for Holt and Judice to meet at the gunshop about 5 P.M. on April 17.

When Holt returned the afternoon of the 17th Parker was in the store but Judice was not. After Holt had waited fifteen or twenty minutes Parker called him to the telephone where he discussed guns with a person later identified by him as the appellant Merritt. After

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[3]This transaction was the basis of a separate prosecution of Parker.
[4]This weapon was introduced in the trial below as Government's Exhibit 2.

first offering Merritt $125.00 for an automatic carbine for which Merritt's asking price was $260.00, Holt agreed to pay Merritt $250.00 for the weapon provided Merritt was able to supply other automatic weapons in good condition. They agreed to meet about 8 P.M., which they did along with Parker and Judice. Merritt delivered the automatic carbine and prices for other illegal weapons were discussed and an agreement reached as to price. Holt later called Merritt at a telephone number furnished by Merritt and agreements were reached as to the price and meeting place where the additional weapons would be delivered to Holt and the money paid. Under this agreement Holt and Owens met the appellants Judice and Merritt about 1 A.M., April 18, in a desolate area about four miles east of Pascagoula, Mississippi, where the exchange took place.

Judice's testimony was to the effect that he was introduced to Holt at Parker's shop and was told that Holt was looking for automatic weapons for an invasion of Cuba and that a premium price would be paid for such weapons. Judice denied discussing automatic weapons with Holt at this time and testified that he did not own any or know where any could be located. He testified that he went back to Pascagoula to Merritt's home and during a casual conversation Merritt remarked that a Mr. Paul Woods had discussed some automatic guns with him. Merritt then called Woods, found that he had such guns, and phoned Parker to arrange for a meeting on the following day. Judice admitted that he and Merritt carried an automatic carbine to this meeting and that this was at a time

prior to the acquisition of the other weapons from Woods. Judice's testimony as to the transfer of the guns at 1 A.M. on April 18 did not differ materially from the testimony of Holt and Owens. He further testified that he and Merritt received $500.00 each as their part of the bargain. He testified that at this meeting he was wearing gloves and had a shotgun.

Merritt's testimony was similar in material respects to that of Judice as to the meeting at Merritt's home, the discussion about machine guns and the call about guns to Mr. Woods and the ensuing call to Parker's gunshop setting up the meeting with Holt. He further testified that he took the automatic carbine to Parker's where he first met Holt and that he was armed with a pistol during that discussion. He admitted the transfer of the firearm, that he knew the transaction was illegal, and that he had committed a crime. In his testimony Merritt related no acts or declarations of either government agent susceptible of being construed as an unlawful inducement to sell the firearms.

The motion for directed verdict on the basis of entrapment was made after both sides rested, the court holding that the defense of entrapment should be submitted to the jury. The sufficiency of the instructions on this point was not excepted to by either appellant and no request for additional instructions was made. The appellants' sole contention is that under the facts of the case the trial court should, as a matter of law, have ruled that the appellants were entrapped and entered a judgment of acquittal on their behalf.

In this connection, the appellants rely primarily on *Sherman v. United States*, 1958, 356 U.S. 369, 78 S.Ct. 819, 2 L.Ed.2d 848. That case held that Sherman was entrapped by the use of an informer and that the government cannot disassociate itself from his acts. In *Sherman*, however, there was repeated persuasion, including an appeal to sympathy and an inducement offered to the defendant himself to return to the use of narcotics on an habitual basis. *Sherman* thus is clearly distinguishable from the case at bar since Holt's offer was couched strictly in business terms and was made only once. The agents testified that they offered no inducements and that the prices they paid were reasonable in the underworld firearms business. It would appear that the jury was justified in deciding that the appellants simply were afforded the opportunity to violate the law, which they did, and that no entrapment by the government's agents took place. We hold that under the facts of this case the defense of entrapment was a proper matter for submission to the jury and that since the defense was submitted to the jury in unassailed language error is not made to appear.

The judgments appealed from are

AFFIRMED.

APPENDIX B

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 71-2526

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

ALEX J. JUDICE and W. R. MERRITT, SR.,
Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Mississippi

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(March 23, 1972)

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion Feb. 16, 1972, 5 Cir., 1972 ____F.2d____)

Before GEWIN, AINSWORTH and SIMPSON, Circuit Judges.

PER CURIAM: Our attention is called by the Petition for Rehearing to the following language appearing in the text of *United States v. Marion, et al.*, ____ U.S. ____, ____ S.Ct. ____, ____ L.Ed.2d ____ (No. 1719, de-

cided December 20, 1971, 40 Law Week 4092) appearing at page 4097 of 40 Law Week:

> "Since appellees rely only on potential prejudice and the passage of time between the alleged crime and the indictment, see Part IV, infra, we perhaps need go no further to dispose of this case, for the indictment was the first official act designating appellees as accused individuals and that event occurred within the statute of limitations. Nevertheless, since a criminal trial is the likely consequence of our judgment and since appellees may claim actual prejudice to their defense, it is appropriate to note here that the statute of limitations does not fully define the appellees' rights with respect to the events occurring prior to indictment. Thus the Government concedes that the Due Process Clause of the Fifth Amendment would require dismissal of the indictment if it were shown at trial that the pre-indictment delay in this case caused substantial prejudice to appellees' rights to a fair trial and that the delay was a purposeful device to gain tactical advantage over the accused. *Cf. Brady v. Maryland,* 373 U.S. 83 (1963); *Napue v. Illinois,* 360 U.S. 264 (1959). However, we need not, and could not now, determine when and in what circumstances actual prejudice resulting from pre-accusation delays requires the dismissal of the prosecution. Actual prejudice to the defense of a criminal case may result from the shortest and most necessary delay; and no

one suggests that every delay-caused detriment to a defendant's case should abort a criminal prosecution. To accommodate the sound administration of justice to the rights of the defendant to a fair trial will necessarily involve a delicate judgment based on the circumstances of each case. It would be unwise at this juncture to attempt to forecast our decision in such cases."

We view this as simply a caveat by the Court to the effect that a case may be presented in which substantial prejudice to a fair trial may be shown to have occurred because of pre-indictment delay. Other than vague generalities asserting that their defense was prejudiced because of delay, the appellees have made no showing of delay-induced prejudice in this case. The showing is characterized in the petition for rehearing as follows:

"The brief of the Petitioners pointed out the loss of witnesses,[1] the loss of evidence and particularly the blurring of the memories of the Petitioners and their witnesses. The brief contrasted the sharp, crisp testimony of the government agents, trained agents who were able to note during their investigation those important elements necessary for securing a conviction. Appellants had no knowledge that they were delaying the government agents or that

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[1]As we read the appellants' brief this is limited to the disappearance of a single person who might have furnished evidence for the defense.

> they would be formally accused until the indictments were returned against them twenty-one months later. The State was able to proceed methodically to build this case while the Petitioners proceeded to lose theirs."

It seems to us that the same or similar allegations might well be urged in any criminal case in which the indictment occurs twenty-one months after the events upon which it is based. But all practiced trial lawyers are well aware that the attrition from such delay is more damaging to the prosecution's case than to that of the defense. This will be so as long as the prosecution has the burden of proof. In sum, while we recognize that the hypothetical case forecast by the above quotation from *Marion* may arise some day, we do not believe that this is such a case.

The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35, F.R.A.P.; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.